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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

CITY AND COUNTY OF  
HONOLULU,

Plaintiff,

v.

U.S. ENVIRONMENTAL  
PROTECTION AGENCY, STEPHEN  
L. JOHNSON, as Administrator of the  
United States Environmental  
Protection Agency, and WAYNE  
NASTRI, as Regional Administrator  
of the United States Protection  
Agency,

Defendants.

Case No.: **C V 08 00404**  
COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF; SUMMONS

FREEDOM OF INFORMATION  
ACT CASE

**SOM LEK**

Plaintiff, the City and County of Honolulu (“CCH”), alleges as follows:

### INTRODUCTION

1. CCH brings this action under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* (“FOIA”) against Defendants United States Environmental Protection Agency (“EPA”), Stephen L. Johnson, Administrator of EPA, and Wayne Nastri, Administrator of EPA Region 9 for an injunction and declaratory relief compelling the production of documents improperly withheld from CCH.

### THE PARTIES

2. Plaintiff CCH is a municipality established under the laws of the State of Hawai’i.

3. The disclosure of the information CCH requests is in the public interest because such disclosure is likely to contribute significantly to CCH’s and the public’s understanding regarding EPA’s tentative decision to deny the renewal of the Clean Water Act (“CWA”) 301(h), 33 U.S.C. § 1301(h), waiver of secondary treatment requirements for CCH’s Honouliuli and Sand Island Waste Water Treatment Plants (“WWTPs”). There are no other documents, other than EPA’s records, which could provide CCH or the public with any meaningfully detailed understanding of EPA’s tentative decisions.

4. CCH is adversely affected by EPA’s refusal to release the requested

documents because such refusal discourages CCH and the public from obtaining public records from EPA. In addition, without the requested information, CCH and members of the public will not be able to ascertain whether EPA's decisions were reasoned and justified, or arbitrary and capricious.

5. Defendant EPA is an agency of the government of the United States within the meaning of 5 U.S.C. § 552(f).

6. Defendant Stephen L. Johnson is the Administrator of EPA and is sued in his official capacity only. If ordered by the Court, Mr. Johnson has the authority and ability to remedy the harm inflicted by Defendants' actions.

7. Defendant Wayne Natri is the Administrator of EPA Region 9 and is sued in his official capacity only. If ordered by the Court, Mr. Natri has the authority and ability to remedy the harm inflicted by Defendants' actions.

#### JURISDICTION

8. This Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).

9. This Court has personal jurisdiction over the EPA, the Administrator of EPA, and the Administrator of EPA Region 9. The EPA is a federal agency established by the government of the United States.

## VENUE

10. Venue in the United States District of Hawai'i is proper under 5 U.S.C. § 552(a)(4)(B) because plaintiff resides and has its principal place of business in the District of Hawai'i.

## STATUTORY BACKGROUND

11. FOIA requires federal agencies to provide copies of its records to those who request them. 5 U.S.C. § 552(a)(3)(A).

12. FOIA requires each agency of the federal government, within 20 working days of receiving a request under FOIA, to determine whether to comply with a request, immediately notify the requestor of such determination and the reasons therefore, and notify the requestor of the right to appeal any adverse determination. 5 U.S.C. § 552(a)(6)(A)(i).

13. Where a party appeals an agency determination with respect to a records request, the agency must make the appeals determination within 20 working days of receiving the appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

14. The time limits prescribed for responding to a FOIA request or appeal may be extended by written notice to the requestor. 5 U.S.C. § 552(a)(6)(B)(i).

15. Agency records that involve the following matters may be withheld

from disclosure under 5 U.S.C. § 552(b)(5), (6) and (7): (a) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; (b) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and (c) records or information compiled for law enforcement purposes. 5 U.S.C. §§ 552(b)(5), (6), (7), respectively.

16. The court has jurisdiction to enjoin an agency from withholding agency records and to order the production of any records improperly withheld from the complainant. In such a case, the court shall determine the matter de novo. 5 U.S.C. § 552(a)(4)(B).

17. The court may assess attorney fees and litigation costs against the United States if the plaintiff substantially prevails. 5 U.S.C. § 552(a)(4)(E).

### FACTUAL BACKGROUND

#### A. Honouliuli Waste Water Treatment Plant

18. On April 12, 2007, CCH submitted a FOIA request to EPA Region 9 requesting copies of any and all documents in the possession or control of the EPA relating to the Tentative Decision of the Regional Administrator Pursuant to 40 CFR Part 125, Subpart G dated March 27, 2007, regarding an application from CCH for a renewed variance from full secondary treatment under section 301(h) of

the Clean Water Act for its ocean discharge from the Honouliuli Wastewater Treatment Plant.

19. On April 19, 2007, CCH submitted a FOIA request to EPA Region 9 requesting copies of any and all documents in the possession or control of the EPA: (a) that it considered in issuing its Tentative Decision Document dated April 4, 1988 granting CCH's 301(h) application for a variance from secondary treatment at its Honouliuli Wastewater Treatment Plant; (b) that it considered in issuing its Modified National Pollutant Discharge Elimination System Permit issued by EPA in accordance with the April 4, 1988 Tentative Decision Document, on May 2, 1991, effective as of December 16, 1993 (the "NPDES Permit"); (c) that it issued, filed or signed regarding the issuance of the April 4, 1988 Tentative Decision Document or the NPDES Permit, including but not limited to, documents evidencing EPA's support for the issuance of the April 4, 1988 Tentative Decision Document or the NPDES Permit; and (d) evidencing Christopher A. Sproul's representation of EPA in any matter relating to CCH's wastewater collection and treatment system, including but not limited to, the issuance of the April 4, 1988 Tentative Decision Document or the NPDES Permit.

20. The FOIA requests CCH filed reasonably described the records requested and were made in accordance with FOIA and EPA published rules.

21. On June 28, 2007, EPA responded to CCH's April 12 and 19, 2007 FOIA requests regarding the Honouliuli WWTP, which EPA assigned as FOIA requests 09-RIN-00369-07 and 09-RIN-00385-07, respectively.

22. In its June 28, 2007 letter, EPA stated that it released the following documents in response to CCH's April 12, 2007 FOIA request 09-RIN-00369-07: "documents considered by EPA or otherwise related to the development of EPA's Tentative Decision on [CCH's] request for the Honouliuli Wastewater Treatment Plant for a variance from secondary treatment requirements . . . dating from the beginning of 2005. . . through the issuance of the [Tentative Decision Document]."

23. In its June 28, 2007 letter, EPA stated that it released the following documents in response to CCH's April 19, 2007 FOIA request 09-RIN-00385-07: "documents that were created up to the date of issuance of the 1991 NPDES Permit issued to [CCH] for the Honouliuli [WWTP]."

24. The June 28, 2007 letter also enclosed two privilege logs of responsive documents that EPA withheld from release allegedly pursuant to the FOIA disclosure exemptions under 5 U.S.C. §§ 552(b)(5), (6) and/or (7).

25. On July 26, 2007, CCH submitted an appeal of EPA's June 28, 2007 letter (the "July 26, 2007 Appeal") to EPA's Office of Environmental Information, Records, Privacy and FOIA Branch, challenging the grounds upon which certain

documents were withheld from production under disclosure exemptions 5 U.S.C. §§ 552(b)(5) based on three claims of privilege - deliberative process privilege, attorney client privilege, and attorney work product doctrine - asserted in the two privilege logs.

26. In its appeal, CCH argued that some responsive documents were wrongly withheld from production based on the deliberative process privilege because EPA failed to meet its burden of showing that these documents fall within the privilege. Specifically, CCH argued that these documents were not protected by the deliberative process privilege because they : (a) appear to contain primarily or exclusively factual material; (b) are post-decisional; (c) were adopted as agency position; and/or (d) are dated “unknown.”

27. CCH also argued that some responsive documents were wrongly withheld from production based on the attorney client privilege or attorney work product doctrine because EPA failed to meet its burden of showing that these documents fall within these privileges. Specifically, CCH argued that these documents were not protected by the attorney client or attorney work product privileges because they: (a) do not appear to involve communications to or from an attorney; (b) do not appear to have been generated in anticipation of litigation; (c) do not appear to be the work product of or created at the direction of an



attorney; (d) may have been disclosed to a third party who did not have an interest in maintaining the privilege; (e) may contain independent factual knowledge rather than privileged information; and/or (f) fail to show whether the attorney involved was acting in his/her professional capacity with respect to the particular matter involved.

28. In addition to the flaws CCH identified in its appeals, the privilege log description for 09-RIN-00369-07 fails to adequately explain why a handful of documents are withheld pursuant to law enforcement Exemption 7 (e.g., e-mails regarding meeting with CCH's Mayor). Similarly, the privilege log description for 09-RIN-00385-07 fails to adequately explain why one document is withheld pursuant to privacy Exemption 6. Furthermore, the majority of the documents produced on appeal for 09-RIN-00369-07 were entirely redacted with the exception of the to, from, date, and/or subject lines and/or information regarding meeting logistics. Such redactions render the released documents entirely devoid of content. As a result the responsive documents were, in effect, improperly withheld. Finally, EPA's continued withholding of certain documents is inconsistent with its production of other similar documents and thus is arbitrary. As one example, EPA produced on appeal a handwritten memorandum to the file regarding Honouliuli flows, but withheld on appeal another handwritten memorandum to the file by the same author regarding Honouliuli flows.

29. On October 9, 2007, CCH sent a letter to EPA's Office of General Counsel inquiring about the status of the Honouliuli appeals and when EPA's response could be expected.

30. On October 16, 2007, EPA sent CCH an e-mail indicating that CCH's October 9, 2007 inquiry had been received and the Honouliuli appeals were pending in the Office of General Counsel.

31. On December 12, 2007 and January 2, 2008, CCH sent e-mails to EPA's Office of General Counsel, again inquiring about the status of the Honouliuli appeals.

32. On January 10, 2008, CCH sent a letter to EPA's Office of General Counsel, stating that because EPA had not responded within the statutory deadlines under 5 U.S.C. § 552(a)(6)(C)(i), CCH could seek relief in federal court.

33. On February 12, 2008, EPA's Office of General Counsel responded to the July 26, 2007 Appeal concerning FOIA request 09-RIN-00369-07. In that letter, EPA's Office of General Counsel determined that CCH's appeal should be granted in part and denied in part. EPA determined that certain withheld documents contained some reasonably segregable information that could be, and was, released. EPA's boilerplate appeal decision failed to address a number of the arguments CCH raised, yet EPA found that it properly withheld the remainder of

the documents pursuant to the FOIA disclosure exemptions under 5 U.S.C. §§ 552(b)(5) and (7). EPA also enclosed an addendum to the privilege log concerning FOIA request 09-RIN-00369-07, adding four more responsive documents withheld from production. EPA released 37 documents and withheld 10 documents.

34. On February 13, 2008, EPA's Office of General Counsel responded to the July 26, 2007 Appeal concerning FOIA request 09-RIN-00385-07, stating that EPA Region 9 had been conducting a further review of the withheld documents and had identified documents determined to be releasable in their entirety, which were enclosed.

35. On March 20, 2008, EPA's Office of General Counsel responded further to the July 26, 2007 Appeal concerning FOIA request 09-RIN-00385-07. In that letter, EPA's Office of General Counsel determined that CCH's appeal should be granted in part and denied in part. EPA determined that certain withheld documents contained some reasonably segregable information that could be, and was, released. EPA's boilerplate appeal decision failed to address a number of the arguments CCH raised, yet EPA found that it properly withheld the remainder of the documents pursuant to the FOIA disclosure exemptions under 5 U.S.C. §§ 552(b)(5) and (6). EPA released 70 documents and withheld 91 documents.

36. EPA's decisions to continue to withhold the responsive documents

and redact responsive information from produced documents under FOIA requests 09-RIN-00369-07 and 09-RIN-00385-07 suffer from the flaws identified in paragraphs 25 to 28 above.

B. Sand Island Waste Water Treatment Plant

37. On December 14, 2007, CCH submitted a third FOIA request to EPA Region 9 requesting copies of “any and all documents in the possession or control of the [EPA] relating to the Tentative Decision of the Regional Administrator Pursuant to 40 CFR Part 125, Subpart G dated December 7, 2007, regarding an application from [CCH] for a renewed variance from full secondary treatment under section 301(h) of the Clean Water Act for its ocean discharge from the Sand Island Wastewater Treatment Plant.”

38. On January 15, 2008, EPA responded to CCH’s third 2007 FOIA request, which EPA assigned as FOIA request 09-RIN-00131-08.

39. In its January 15, 2008 letter, EPA stated that it released documents considered by EPA in developing the Sand Island tentative decision in response to CCH’s FOIA request 09-RIN-00131-08.

40. The January 15, 2008 letter also enclosed a privilege log of responsive documents that EPA withheld from release allegedly pursuant to FOIA disclosure exemptions under 5 U.S.C. §§ 552(b)(5) and (7)(i).

41. On February 13, 2008, CCH submitted an appeal of EPA's January 15, 2008 letter to EPA's Office of Environmental Information, Records, Privacy and FOIA Branch, challenging the grounds upon which certain documents were withheld from production under disclosure exemptions 5 U.S.C. §§ 552(b)(5) and 7(i).

42. In its appeal, CCH argued that some responsive documents were wrongly withheld from production based on the deliberative process privilege (5 U.S.C. §§ 552(b)(5)) because EPA failed to meet its burden of showing that these documents fall within the privilege. Specifically, CCH argued that these documents were not protected by the deliberative process privilege because they: (a) appear to contain primarily or exclusively factual material; (b) are post-decisional; (c) were adopted as agency position; and/or (d) are dated "unknown."

43. CCH also argued that some responsive documents were wrongly withheld from production based on the attorney client privilege or attorney work product doctrine (5 U.S.C. §§ 552(b)(5)) because EPA failed to meet its burden of showing that these documents fall within these privileges. Specifically, CCH argued that these documents were not protected by the attorney client or attorney work product privileges because they: (a) do not appear to involve communications to or from an attorney; (b) do not appear to have been generated in

anticipation of litigation; (c) may have been disclosed to a third party who did not have an interest in maintaining the privilege; and/or (d) fail to show whether the attorney involved was acting in his/her professional capacity with respect to the particular matter involved.

44. Finally, CCH argued that documents were wrongly withheld from production based on the law enforcement exemption (5 U.S.C. §§ 552(b)(7)(i)) because (a) subsection “7i” does not exist; and (b) the inadequate privilege log description makes a determination the documents were compiled for law enforcement purposes impossible.

45. On March 4, 2008, EPA Region 9 sent CCH a revised privilege log, changed the enforcement privilege from 7(i) to 7(A), released a handful of heavily redacted documents, and noted that the response was not an EPA appeal decision.

46. On May 19, 2008, CCH sent an e-mail to EPA’s Office of General Counsel inquiring about the status of the appeal. On June 3, 2008, CCH sent a letter to EPA’s Office of General Counsel, stating that because EPA had not responded within the statutory deadlines under § 552(a)(6)(C)(i), CCH could seek relief in federal court.

47. On July 22, 2008 EPA’s Office of General Counsel responded to the February 13, 2008 Appeal concerning FOIA request 09-RIN-00131-08. In that

letter, EPA's Office of General Counsel determined that CCH's appeal should be granted in part and denied in part. EPA determined that certain withheld documents contained reasonably segregable information that could be, and was, released. EPA's boilerplate appeal decision failed to address a number of the arguments CCH raised, yet EPA found that it properly withheld the remainder of the documents pursuant to the FOIA disclosure exemptions under 5 U.S.C. §§ 552(b)(5) and (7)(A).

48. EPA's decision to continue to withhold the responsive documents and redact responsive information from produced documents under FOIA request 09-RIN-003131-08 suffers from many of the flaws identified in paragraphs 42 to 44 above.

#### FIRST CLAIM FOR RELIEF

Violation of FOIA  
5 U.S.C. § 552(a) et seq.

49. Plaintiff CCH reasserts and realleges paragraphs 1- 48 above.

50. Defendant EPA has improperly withheld documents responsive to Plaintiff CCH's FOIA requests 09-RIN-00369-07, 09-RIN-00385-07, and 09-RIN-00131-08 pursuant to FOIA disclosure exemptions 5 U.S.C. §§ 552(b)(5), (6) and (7). Moreover, EPA's extensive redactions to documents responsive to 09-RIN-

00369-07 resulted in their effective withholding.

51. Defendant EPA has failed to provide sufficient justification for withholding certain documents and improperly redacting responsive information from certain produced documents under 5 U.S.C. §§ 552(b)(5), (6) and (7).

### REMEDY

52. CCH has no plain, speedy, and adequate remedy, in the ordinary course of law, other than the relief sought in this Complaint, because there is no other mechanism for compelling EPA to take the action necessary under the FOIA.

### PRAYER FOR RELIEF

WHEREFORE, Plaintiff CCH seeks the following relief

1. An injunction pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. §§ 701-706 enjoining EPA from withholding the requested documents, including the extensively redacted documents;

2. An injunction pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. §§ 701-706 ordering EPA to immediately provide sufficient identification and justification of the documents withheld should EPA have properly withheld any documents, including a Vaughn index providing particularized explanations of how disclosure would violate the claimed exemptions;



3. A declaratory judgment pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. §§ 701-706 compelling EPA to produce all documents, including the extensively redacted documents, that should not be withheld from CCH;
4. An award for attorneys' fees and costs to CCH; and
5. Such other and further relief as this Court deems just and proper.

DATED: Honolulu, Hawaii  
September 8, 2008

Respectfully submitted,  
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